UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
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VIA E-FILING September 16, 2022

The Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. EPA, Office of Administrative Law Judges
Ronald Reagan Building, Room Ml 200
1300 Pennsylvania Avenue, NW
Washington, DC 20004

Re: August Mack Environmental, Inc. (AME)
Docket No. CERCLA-HQ-2017-0001

Dear Judge Biro,

On behalf of the United States Environmental Protection Agency, I enclose for your consideration a *Renewed* Motion for Accelerated Decision in this matter, and a *Renewed* Memorandum of Law in Support of the Agency's *Renewed* Motion for Accelerated Decision on the Issue of Whether AME Substantially Complied with the Preauthorization Process. According to past practice before this Tribunal, my understanding is that a Proposed Order is not necessary. Please advise if my understanding is not correct.

Sincerely,

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In the Matter of:) Docket No.: CERCLA-HQ-2017-0001
)
August Mack Environmental Inc.) EPA'S RENEWED MOTION FOR
) ACCELERATED
)
Requestor)

EPA'S RENEWED MOTION FOR ACCELERATED DECISION

Pursuant to 40 C.F.R. Part 305, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Administrative Hearing Procedures for Claims Against the Superfund, the United States Environmental Protection Agency (EPA) respectfully moves that the Presiding Officer enter an Order on Accelerated Decision finding that no genuine issue of material fact exists with respect to AME's claim, and that EPA is entitled to judgment as a matter of law as to the entirety of this proceeding. *See* 40 C.F.R. § 305.27(a). Consequently, Counsel for EPA respectfully request that the Agency's Renewed Motion for Accelerated Decision be GRANTED, and AME's Hearing Request be DISMISSED with prejudice, with no award granted to AME. The factual and legal basis for this Renewed Motion for Accelerated Decision are detailed in the attached Renewed Memorandum of Law and accompanying exhibits.

Respectfully submitted,

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	Docket No.: CERCLA-HQ-2017-0001
	)	
August Mack Environmental Inc.	)	EPA'S RENEWED MOTION FOR
	)	ACCELERATED
	)	DECISION
	)	
Requestor	)	

MEMORANDUM OF LAW IN SUPPORT OF AGENCY'S MOTION FOR ACCELERATED DECISION ON THE ISSUE OF WHETHER AME SUBSTANTIALLY COMPLIED WITH THE PREAUTHORIZATION PROCESS

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I. INTRODUCTION

The United States Environmental Protection Agency ("Agency" or "EPA") hereby submits this Renewed Memorandum of Law in support of its Renewed Motion for Accelerated Decision in this matter, and hereby affirms that the foregoing submittal is consistent with: 1.) the Tribunal's Order of Redesignation and Prehearing Order dated September 8, 2021 ("ALJ Prehearing Order"); 2). the Tribunal's Order on Requestor's Motion to Compel Discovery and for Sanctions dated May 12, 2022 ("ALJ Discovery Order") and the CERCLA Administrative Hearing Procedures for Claims against the Superfund set forth at 40 C.F.R. Part 305 ("Rules of Practice" or "Rules"). This matter pertains to a proceeding under Sections 111(a)(2) and 112(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9611(a)(2) and 9612(b)(2), and the Agency's implementing

regulations set forth at 40 C.F.R. Part 307, which contain the relevant CERCLA claims procedures.

By way of introduction, the preauthorization process described in 40 C.F.R. Part 307 was adopted so that EPA can manage the limited amount of monies in the Fund, and assure that those monies are spent in the most appropriate way.[1] EPA explained when promulgating the reimbursement regulations that "[t]the preauthorization requirement is necessary for proper Fund management, to ensure that Fund monies be available for the most urgent priorities." 50 Fed. Reg. 5862, 5873 (Feb.12, 1985). *See also*, nt.1. Prior to granting preauthorization or otherwise obligating Superfund ("Fund") monies, EPA must weigh the "importance of the [proposed] response activity when compared with the competing demands of the Fund." 40 C.F.R. § 307.23(b)(2).

More than thirty years ago, the Court of Appeals for the District of Columbia affirmed EPA's regulations requiring preauthorization for claims made against the Fund. In upholding the regulatory preauthorization requirements, the Court acknowledged that "EPA is required to serve as the protector and distributor of scarce government resources." *State of Ohio v. EPA*, 838 F.2d 1325, 1331 (D.C. Cir. 1988).[2] Furthermore, the Court stated that "EPA can hardly be said to be acting unreasonably in using the NPL to screen sites toward the cleanup of which limited resources ought to be marshalled. Thus, the requirements that a private claim for response costs be preauthorized by EPA…reflect[s] priorities for management of the Fund set out in CERCLA

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[1] Among other things, "[p]reauthorization…enables the Agency to…fulfill its role as Fund manager by ensuring appropriate uses of the Fund. In this way, Fund money available for claims is expended in accordance with environmental and public health priorities. Because the number of incidents that may give rise to claims is large, and because remediating a single incident can involve considerable expense, it is essential that the Agency screen possible claims to determine the importance of the response action that may be undertaken relative to other response needs." 54 FR 37892, 37898 (Sept.13, 1989)

[2] The Court in *Ohio v. EPA* upheld the language of 40 C.F.R. § 300.25(d), which was later restated in 40 C.F.R. § 307.22(a). See Response Claims Procedures for the Hazardous Substance Superfund, 54 Fed. Reg. at 37898.

itself." *Id*. at 1331. Thus, "to ignore the requirement of preauthorization or cast it as mere formalism would inhibit the Agency's ability to preserve scarce government resources under its charge." ALJ Order on Motion to Dismiss at 10 (12/18/2017). To that end, EPA'sregulations require a prospective claimant to fulfill certain requirements "before commencing a response action." 40 C.F.R. § 307.22(a). Chief among these is the submission of an "application for preauthorization." *Id.* & 40 C.F.R. § 307.14.

In the matter on remand before this Court, AME has admitted that it never sought, nor intended to seek, prior approval to submit a claim against the Fund pursuant to EPA regulation (i.e. the preauthorization process set forth in 40 C.F.R. Part 307). Furthermore, AME has admitted that it submitted forms for a claim against the Fund five years after it initiated response actions. These facts alone allow the Court to find that AME did not "substantially comply" with the preauthorization process.

Based on the pleadings and related documents set forth in both the administrative and judicial dockets, as well as the facts and law set forth herein, the Agency seeks an Order on Accelerated Decision finding that no genuine issue of material fact exists with respect to AME's claims, and EPA is therefore entitled to judgment as a matter of law as to the entirety of this proceeding. *See* 40 C.F.R. § 305.27(a). Consequently, Counsel for EPA respectfully request that the Agency's Renewed Motion for Accelerated Decision be GRANTED, and AME's Hearing Request be DISMISSED with prejudice.

II. PROCEDURAL HISTORY

As notated in the ALJ Prehearing Order, this matter was previously before the Court in 2017, after EPA denied AME's claim for payment from the Fund for CERCLA related work the company performed on behalf of Vertellus, pursuant to the Big John Salvage Consent Decree ("Decree" or "Consent Decree"). On December 18, 2017, following AME's request for a

hearing on the denial of its claim, this Court granted EPA's Motion to Dismiss AME's claim for payment. *See* EPA Order on Motion to Dismiss ("Order").[3] AME then appealed the decision by filing a complaint in federal district court. *August Mack Envtl., Inc.. v. EPA*, No.1:18-CV-12 (N.D. W.Va. filed January 17, 2018; as amended June 1, 2018). The District Court upheld the Tribunal's Order. *See Id.* (Order Granting Motion to Dismiss Amended Complaint (July 11, 2019).[4] August Mack then appealed the District Court's ruling to the U.S. Court of Appeals for the Fourth Circuit. *August Mack Envtl., Inc. v. EPA*, No. 19-1962 (4th Cir. Filed Sept. 5, 2019). On January 7, 2021, the Court of Appeals issued an Opinion vacating the District Court's order. The Court ruled that "it was legal error for the EPA to require *strict* compliance with its preauthorization process in order for [AME] to prove its Superfund claim" and remanded the case "for further administrative proceedings" to assess whether AME "*substantially* complied with the preauthorization process". *August Mack Envtl., Inc. v. EPA*, 841 Fed. App'x 517, 524-25 (4th Cir. 2021) (emphasis added).[5] The District Court ordered the case be remanded to this Tribunal for further proceedings consistent with the Fourth Circuit Opinion. *See August Mack*, No. 1:18-CV-12 (N.D. W.Va. Aug.3, 2021) (Order on Joint Motion for Remand to the U.S. Environmental Protection Agency).

The Tribunal received the District Court's remand order on August 16, 2021. On August 27, 2021, counsel for AME filed a notice of Appearance and a Request for Prehearing Conference pursuant to 40 C.F.R. § 305.26. Finding that no formal prehearing conference was necessary, the Court denied AME's request, and issued a detailed prehearing schedule.. ALJ

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[3] The administrative procedural history, which does not bear further repeating, is set forth in the Court's Order. *Id*. at 1-2.
[4] All subsequent references to the U.S. District Court Order are citations to the Order downloaded from the Pacer system, and identified as document 46 in the Court's docking system.
[5] If EPA grants a request for preauthorization, the preauthorization process results in an approval document ("Preauthorization Decision Document" or "PDD") from EPA that sets forth the terms and conditions for potential reimbursement of any preapproved costs, as outlined in 40 C.F.R. Part 307.

Prehearing Order at 2. At the same time, the Court framed the scope of the subject administrative adjudication as follows: "[h]aving reviewed the [Fourth Circuit] Opinion, it is this Tribunal's position that the only issues that require further administrative consideration are whether August Mack "substantially complied" with the preauthorization process described in 40 C.F.R. pt. 307 and, if so, whether its request for payment from the Superfund should be granted." Order at 2 (nt.2).[6] The parties have since agreed to additional discovery to develop the record as to whether August Mack "substantially complied." In addition to written discovery, August Mack deposed three EPA witnesses. ALJ Biro also permitted EPA to file this Renewed Motion, extending the deadline to do so through September 16, 2022.

III. APPLICABLE LAW AND REGULATIONS

A. Substantive Law

Congress enacted CERCLA, 42 U.S.C. §§ 9601-75 (as amended), in 1980 in response to the serious environmental and public health problems posed by the disposal of hazardous substances, exemplified by sites such as Love Canal. *See Dedham Water Co. v. Cumberland Farms Dairy, Inc*., 805 F.2d 1074, 1081 (1st Cir. 1986). It's overriding purpose is "to protect and preserve public health and the environment by facilitating the expeditious and efficient cleanup of hazardous waste sites," *Pritikin v. Dep't of Energy*, 254 F.3d 791, 794-95 (9th Cir. 2001), while at the same time "placing the ultimate financial responsibility for cleanup on those responsible for the hazardous waste." *Wash. State Dep't of Transp. V Wash. Natural Gas Co*.,

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[6] The parties have already stipulated to the Court's understanding of the Fourth Circuit Opinion, stating jointly that "the Fourth Circuit held that the ALJ erred by not applying a 'substantial compliance' standard when adjudicating whether August Mack satisfied the statutory and regulatory requirements *for seeking* Superfund reimbursement." *Joint Motion for Remand to U.S. Environmental Protection Agency* (July 22, 2021) at 2, ¶3 (emphasis added). Per this Court's directive, this remains the only unresolved issue for remand and further consideration by the Court.

59 F. 3d 793, 799 (9th Cir. 1995). To enable EPA to carry out these goals, Congress created the Fund, known as "the Superfund"[7], to finance federal cleanup actions.

The statute grants the Agency "'broad power to command . . . private parties to clean up hazardous waste sites by or at the expense of the parties responsible for the contamination.'" *In re Idaho Conservation League*, 811 F.3d 502, 506 (D.C. Cir. 2016) (quoting *Gen. Elec. Co. v. Envtl. Prot. Agency*, 360 F.3d 188, 189 (D.C. Cir. 2004)). "CERCLA also authorizes EPA to undertake 'response actions' — using funds from the Hazardous Substance Superfund[8] — when there is a release or substantial threat of release of a hazardous substance …" *Id.* The Agency may then "replenish the expended funds through a cost recovery action against the parties responsible for the release." *Id.* (citing 42 U.S.C. § 9607(a)).

Section 111 of CERCLA, as amended, describes the purposes for which the Fund and its limited appropriations may be expended. 42 U.S.C. § 9611. In relevant part, it authorizes payments from the Fund for certain enumerated purposes, including – in certain circumstances - reimbursement of private parties for clean-up costs. In particular, Section 111 directs that Fund money shall be used for "[p]ayment of any claim for necessary response costs incurred by any other person[9] as a result of carrying out the national contingency plan[10] . . . : *Provided, however*, That such costs must be *approved* under said plan and *certified* by the responsible Federal

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[7] The Superfund was originally established under 221 of CERCLA, but in 1986 Congress repealed that provision and amended the IRS Code to the same end. See 26 U.S.C. § 9507 (part of the Superfund Amendments and Reauthorization Act).

[8] The Fund is held in the Treasury of the United States pursuant to 26 U.S.C. § 9507.]

[9] Under CERCLA, the term "person" includes corporations. 42 U.S.C. § 9601(21).

[10] The "national contingency plan" is the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), which "provides the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants." *See* 40 C.F.R. § 300.1. The NCP is required by Section 105 of CERCLA, 42 U.S.C. § 9605, and by Section 311(d) of the Clean Water Act ("CWA"), 33 U.S.C.
§ 1321(d), as amended by the Oil Pollution Act of 1990, Pub. L. 101-380. *See* 40 C.F.R. § 300.2. Among other roles, the NCP provides procedures for undertaking response and removal actions under CERCLA and the CWA. *See* 40 C.F.R. § 300.3(b)(3)-(4).

official." 42 U.S.C. § 9611(a)(2).[11] This is the direct authority for the Agency's preauthorization requirement. Section 112 of CERCLA outlines the procedures for a person to assert a claim against the Fund for response costs. 42 U.S.C. § 9612. Specifically, it defines the broad requirements with which a person must comply before making a claim and further authorizes the Agency to "prescribe appropriate forms and procedures" for filing such claims. 42 U.S.C. § 9612(b)(1).[12]

Consequently, the Agency promulgated regulations at 40 C.F.R. Part 307 that "prescribe the appropriate forms and procedures" for making a claim against the Fund. *See* 40 C.F.R. § 307.10. These regulations set forth the following baseline requirements that must be met before a claim is eligible for reimbursement:

> (1) The response action is preauthorized by EPA pursuant to § 307.22;
> (2) The costs are incurred for activities within the scope of EPA's preauthorization;
> (3) The response action is conducted in a manner consistent with the NCP; and
> (4) The costs incurred are necessary costs pursuant to § 307.11 of this part.

40 C.F.R. § 307.21(b). "Preauthorized" and "preauthorization" are defined terms. As defined, a claimant must take certain specified actions before making a claim and receiving payment from the Fund:

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[11] This provision in Section 111(a)(2) of CERCLA is the statutory text from which EPA derives the authority to require preauthorization. *See* Response Claims Procedures for the Hazardous Substance Superfund, 54 Fed. Reg. 37892, 37898 (Sept. 13, 1989)(Proposed Rule). *See also* Response Claims Procedures for the Hazardous Substance Superfund, 50 Fed. Reg. 5460, 5461 (Jan. 21, 1993)(Final Rule).

[12] Only response actions that EPA has preauthorized are eligible for reimbursement through the claims process of section 112 of CERCLA. Authority for the payment of claims for response costs is provided by section 111(a)(2) of CERCLA. Authority for the reimbursement of certain costs incurred by the parties to a settlement agreement entered pursuant to section 122 of CERCLA is provided by section 122(b) of CERCLA. 40 C.F.R. § 307.11. Section 9 of Executive Order 12580, as amended, delegated the Management of the Hazardous Substance Superfund and Claims to the Administrator of EPA. In addition, revisions of the National Contingency Plan are delegated to the EPA Administrator by Section 1(b) of the Executive Order.

> *Preauthorization* means EPA's prior approval to submit a claim against the Fund for necessary response costs incurred as a result of carrying out the NCP. The process of preauthorization consists of three steps:
>
> (1) EPA's receipt of the application for preauthorization;
> (2) EPA's review and analysis of the application; and, if granted,
> (3) EPA's issuance of the Preauthorization Decision Document, which sets forth the terms and conditions for reimbursement.

40 C.F.R. § 307.14. If EPA receives a timely and complete application for preauthorization *prior to the commencement of any proposed response action*, EPA then exercises its *discretionary function* to either grant or deny the application. 40 C.F.R. §307.22(a). Specifically, "EPA shall review each preauthorization application and will notify the applicant of the decision to grant or deny preauthorization. Decisions to grant preauthorization will be memorialized in a [Preauthorization Decision Document] PDD." 40 C.F.R. § 307.23(a). "If EPA grants preauthorization, the applicant may begin the approved response action subject to the terms and conditions contained in the PDD." 40 C.F.R. § 307.23(e). The PDD terms and conditions include, *inter alia*, the maximum amount of money that may be claimed as reimbursement from the Fund, procedures for certifying and approving cost claims, etc. *Id*. *See* also 40 C.F.R. § 307.22(c)(providing the Administrator full discretion as to whether and under what conditions it may decide to grant prior approval).

Completing the preauthorization process requires the claimant to obtain EPA's preauthorization "*before commencing a response action*." 40 C.F.R. § 307.22(a) (emphasis added). In fact, "[n]o person may submit a claim to the Fund for a response action unless that person notifies the Administrator of EPA or his designee *prior to taking such response action and receives preauthorization by EPA*." 40 C.F.R. § 307.22(a)-(emphasis added); *see also* 40 C.F.R. § 307.11 ("Only response actions that EPA has preauthorized are eligible for

reimbursement through the claims process of section 112 of CERCLA."). Because the claimant must "[o]btain the approval of the Administrator…before initiating the response action", the entire "preauthorization" process must be completed and effectuated *prior to* undertaking any proposed response action. 40 C.F.R. § 307.22(a)(3)(emphasis added).

After obtaining prior authorization through a PDD, the claimant may proceed to initiate the proposed response action consistent with the PDD terms and conditions. After the claimant has incurred specific response costs, the claimant may file a claim against the Fund consistent with the PDD and Part 307. Part 307 describes the process for certifying and perfecting a claim. Once the claimant has complied with Part 307's requirements for submitting a claim, then and only then, may EPA determine whether to award the claim, consistent with, *inter alia*, 40 C.F.R. § 307.32(f).[13]

After an "eligible claim" is filed against the Fund, and the Agency "declines to pay all or part of the claim, the claimant may, within 30 days after receiving notice of the . . . decision, request an administrative hearing." 42 U.S.C. § 9612(b)(2). All administrative proceedings for the total or partial denial of claims asserted under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2), are governed by 40 C.F.R. Part 305 ("Rules"). 40 C.F.R. § 305.1. The claimant bears the burden of proving its claim, both as to presentation and persuasion, by a preponderance of the evidence. 42 U.S.C. § 9612(b)(3); 40 C.F.R. § 305.33.

[13] § 307.32(f), in relevant part, states that awards will only be made: "(2) only to the extent that the response actions were preauthorized by EPA…and (4) Only to the extent that the clean-up was performed in compliance with the terms and conditions of the PDD."

IV. FACTUAL BACKGROUND[14]

The Big John's Salvage-Hoult Road Superfund Site ("BJS Site" or "Site") is a 38-acre former industrial property used for coal tar refining, salvage operations, and waste disposal. It is located in Marion County, West Virginia near the east bank of the Monongahela River. Parties that have been identified as potentially responsible for contaminating the Site include Exxon Mobil Corp., CBS Corp., and Vertellus Specialties, Inc. Hearing Request, ¶¶ 1-3; Ans., ¶¶ 1-3.

On June 10, 2008, the Agency sued ExxonMobil under Section 107 of CERCLA, 42 U.S.C. § 9607, seeking to recover response costs the Government had incurred at the Site since the early 1980s as well as costs it expected to incur in the future. Hearing Request, ¶ 14; Ans. ¶ 14; *see also United States v. Exxon Mobil Corp*., No. 1:08-cv-00124-IMK (N.D. W.Va. June 10, 2008) (Doc.1-3). More than four years later, on October 10, 2012, the Agency entered into a Consent Decree with Exxon Mobil – as well as CBS and Vertellus, who intervened after the complaint was filed – that resolved the litigation. Hearing Request, ¶¶ 14-18; Ans. 14-18. Under the Consent Decree, Vertellus was tasked with cleaning up the Site, while ExxonMobil and CBS provided clean-up funding. Hearing Request, ¶¶ 19-20; Ans., ¶¶ 19-20. More specifically, Vertellus obtained a $10.5 million irrevocable letter of credit, and a trust fund was created to guarantee performance of Site-specific work. Ex.A to Claim at 33-35. Also under the Consent Decree, CBS paid $5 million and ExxonMobil paid $6 million into the trust fund. Ex.A to Claim at 48. Further, a second Site-specific trust fund was created under the Consent Decree into

[14] The facts are derived from the pleadings in this matter, principally the Court's Findings of Fact set forth in ALJ Biro's Order on Motion to Dismiss (Order at 2-3); the subject BJS RD/RA Consent Decree at 2-6; *See also* Plaintiff-Appellant's *Amended Complaint for Judicial Review of Final Administrative Decision and Request for Jury Trial* filed with the United States District Court, Northern District of West Virginia at Clarksburg, June 1, 2018)(Ex.A).

which Vertellus paid $5.056 million and ExxonMobil paid $5 million to cover the site-specific work. Ex.A to Claim at 35, 49.

The Consent Decree additionally required Vertellus to hire a supervising contractor whose selection was subject to Agency acceptance. Hearing Request, ¶¶ 38-39; Ans., ¶¶ 38-39. Vertellus chose August Mack as its supervising contractor for work at the Site, and the Agency accepted August Mack's selection on November 6, 2012. Hearing Request, ¶¶ 41-42; Ans., ¶¶ 41-42.

As supervising contractor, August Mack — on behalf of Vertellus — prepared and submitted to the Agency a Removal Design Work Plan to guide overall completion of Vertellus's clean-up work. Hearing Request, ¶¶ 23, 43; Ans., ¶¶ 23, 43. The Agency reviewed and approved the Plan. Hearing Request, ¶ 44; Ans., ¶ 44. August Mack also initiated PreDesign Investigation activities and other tasks on behalf of Vertellus, between October 2013 and February 2016. August Mack's work for Vertellus was approved by the Agency in accordance with the Consent Decree. Hearing Request, ¶¶ 45-49; Ans., ¶¶ 45-49. In total, August Mack represents that it completed more than $2.5 million of work for Vertellus.

On May 31, 2016, Vertellus and ten of its affiliates filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Hearing Request, ¶ 50; Ans., ¶ 50. In court filings, Vertellus listed August Mack as holding a nonpriority unsecured claim for $214,551.56.[15] On October 20, 2016, August Mack filed a proof of claim in the bankruptcy cases for more than $2,627,891.46. Hearing Request, ¶¶ 51-52; Ans., ¶¶ 51-52. Additionally, August Mack requested payment from both CBS and ExxonMobil on August 30 and September 22, 2016, respectively, but both companies

[15] AME's bankruptcy claim for more than 2.6 million was never approved or certified by the Bankruptcy Court.

rejected the request. Hearing Request, ¶ 56; Ans., ¶ 56. August Mack then sought reimbursement from the Fund.

V. STANDARD OF REVIEW FOR ACCELERATED DECISION

Under Section 305.27(a) of the Rules, the Presiding Officer may at any time:

> render an accelerated order in favor of the Requestor or the Claims Official as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as [s]he may require, if no genuine issue of material fact exists and the party is entitled to judgment as a matter of law. 40 C.F.R. § 305.27(a) The Rules further provides:
>
> If an accelerated order . . . is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without *substantial controversy* and what material facts remain controverted *in good faith*. [S]he shall thereupon issue an interlocutory order specifying the facts which appear *substantially uncontroverted*, and the issues upon which the hearing will proceed. 40 C.F.R. § 305.27(b)(2) (emphasis added).

The Rules do not specifically provide a standard for adjudicating motions for accelerated decision.[16] However, the standard for motions for accelerated decision under 40 C.F.R. § 305.27 is similar to the standard for motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), which states that "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[17] FED. R. CIV. P. 56(A); *See, e.g., In re Clarksburg Casket,* 8 E.A.D. 496, 501–502 (EAB 1999), *citing In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793

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[16] EPA is not aware of any administrative or judicial decisions interpreting the Section 305.27(a) standard for accelerated decision. In the absence of any Part 305 case law regarding a Motion for Accelerated Decision, EPA looks to the language set forth in 40 C.F.R. Part 22, because the language of 40 C.F.R. § 305.27 mirrors that set forth in 40 C.F.R. §22.20 of the Consolidated Rules of Practice.

[17] As in administrative enforcement proceedings under 40 C.F.R. Part 22, the Court has latitude to find that the Federal Rules of Civil Procedure and associated jurisprudence offer guidance to this Tribunal in addressing motions for accelerated decision in Part 305 proceedings. See 40 C.F.R. §305.1(b)("Procedural questions arising at any stage of the proceeding which are not addressed in this part shall be resolved at the discretion of the…Presiding Officer."). Order at 6; nt.10.

(EAB 1997). Thus, FRCP Rule 56 jurisprudence provides useful guidance for adjudicating motions for accelerated decision. *Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993).

The burden of showing that no genuine issue of material fact exists rests on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). The Environmental Appeals Board ("EAB") has defined the words "material" and "genuine" as used in this context as follows:

> A factual dispute is *material* where, under the governing law, it might affect the outcome of the proceeding. . . . A factual dispute is *genuine* if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor. . . . If so, summary judgement is inappropriate and the issue must be resolved by the finder of fact. If, on the other hand, the evidence, viewed in a light most favorable to the non-moving party, is such that no reasonable decision maker could find for the nonmoving party, summary judgment is appropriate.

Mayaguez, 4 E.A.D. at 781 (citations omitted).

The evidentiary standard of proof in cases for the administrative assessment of civil penalties governed by the Rules is a "preponderance of the evidence." 40 C.F.R. § 305.33. Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. *In the Matter of Harpoon P'ship,* Docket No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 52, at *19-20 (ALJ, August 4, 2003). On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. *Id.*

In considering a motion for summary judgment, the court must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes,* 398 U.S. at 158-159. Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). However, the nonmoving party cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson,* 477 U.S. at 256. A party responding to a motion for accelerated decision must produce some evidence that places the moving party's evidence in question and raises a question of material fact for an adjudicatory hearing. *Harpoon*, 2003 EPA ALJ LEXIS at *18, citing *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57, at *22-23 (September 9, 2002).

VI. ACCELERATED DECISION IN FAVOR OF EPA IS WARRANTED BECAUSE AME CANNOT ESTABLISH THAT A "GENUINE ISSUE OF MATERIAL FACT" EXISTS AS TO WHETHER IT SUBSTANTIALLY COMPLIED WITH THE REQUIREMENT TO SEEK PREAUTHORIZATION PURSUANT TO 40 C.F.R. § 307.22.

A. The "substantial compliance" legal standard applicable to the case at bar

The legal definition of *substantial compliance* is: "compliance with the substantial or essential requirements of something (as a statute or contract) that satisfies its purpose or objective even though its formal requirements are not complied with".[18] Consistent with the Fourth Circuit opinion, the doctrine of substantial compliance is a tool designed to "assist the court in determining whether conduct should, in reality, be considered the *equivalent of compliance*." *See Peckman v. Gem State Mut.*, 964 F.2d 1043, 1052 (10th Cir. 1994) (emphasis

[18] "Substantial compliance." Merriam-Webster.com Legal Dictionary, Merriam-Webster, https://www.merriam-webster.com/legal/substantial%20compliance. Accessed 18 Oct. 2021.

added). It remains "an equitable doctrine designed to avoid hardship in cases *where the party does all that can reasonably be expected of him*." See *Sawyer v. Sonoma Cnty*., 719 F.2d 1001, 1008 (9th Cir.-1983) (emphasis added).[19]

B. AME did not substantially comply with the essence of EPA's procedures for claims against the Fund, as AME admits it did not seek, or attempt to seek, preauthorization before initiating response actions.

AME did not substantially comply with the "essential requirements" for preauthorization; nor can it retroactively establish that it's conduct should be considered "*the equivalent of compliance*".[20] To the contrary, AME has made several concessions that underscore its complete lack of substantial compliance. As an initial matter, AME has repeatedly acknowledged that it did not intend to seek, nor attempt to seek, preauthorized funding of the response action, as required by 40 C.F.R. §§ 307.21 and 307.22. AME's concession on this point is plain. AME has stated it "did not intend to submit a claim to the fund *at the time*" because "AME *never* formed an 'intent' to submit a claim when it began work at the BJS Site" and that "AME had no reason to submit an application for preauthorization to conduct work" ***before*** commencing the response action. AME Response in Opposition to EPA's Motion to Dismiss at 9 (Response) (emphasis added). In its Response, AME claims instead that EPA's preauthorization regulations simply "do not apply to AME," and therefore "AME had no reason to submit an application for preauthorization to conduct work." *Id.* *See also* AME Request for Hearing at 6 ("…preauthorization was never warranted when AME began work at the BJS Site because, at

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[19] This legal standard is applicable to the requisite evidence and data that EPA must be able to assess when a person is requesting preauthorization. *See* 40 C.F.R. § 307.22(b) and (c)(enumerating the data that must be provided to EPA in order to fulfill the purpose or objective of the application process such that EPA is afforded the ability to review and analyze it). 40 C.F.R. § 307.14; § 307.22(a).

[20] *See Peckman v. Gem State Mut.,* 964 F.2d 1043, 1052 (10th Cir. 1994) (emphasis added).

that time, the work was being performed for a viable PRP with financial assurances guaranteed by a federally enforceable Consent Decree.").[21]

Without having formed the intent to seek preauthorization, and given its erroneous conclusion that the entire preauthorization process "*simply does not apply*" to AME[22], AME in no way could have attempted to comply with the preauthorization process, let alone substantially complied with it..[23] Moreover, AME clearly acknowledges that it did not attempt to comply with preauthorization (i.e. *prior* to commencing the response action as required by 40 C.F.R. . § 307.22(a)) when it admits that it was EPA's "denial letter" dated February 8, 2017, "that required AME to seek reimbursement from the Fund." Request for Hearing at 6. It is critical to note that AME's first attempt to seek after-the-fact reimbursement from the Fund admittedly occurred 4 to 5 years after the response action commenced. Therefore, AME admits it did not seek preauthorized funding *prior to commencing work in 2012.* Request for Hearing at 5 ("Beginning in October 2012 and continuing to May 2016, AME diligently performed removal actions…")[24].

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[21] Note that AME's justification for not requesting preauthorization mirrors the prohibition against granting preauthorization where the response action is to be conducted by a responsible party pursuant to a contract with the United States. 40 C.F.R. § 307.23(g)(4).

[22] AME Request for Hearing at 6.

[23] The dissenting opinion by 4th Circuit Judge Diaz puts these facts into context, stating "[b]ut the problem in this case is that August Mack didn't allege *any* facts that suggest it even attempted to comply, much less substantially complied, with the [application] requirement. As the ALJ and the district court recognized, August Mack concedes that it didn't seek preauthorization for the reimbursement from the Superfund because it expected to receive payment for its work from Vertellus (who was contractually obligated to pay August Mack), or the site-specific fund. Indeed, the district court didn't fault August Mack for failing to strictly comply with the EPA's process; rather, it reasoned that August Mack's "substantial compliance argument has no merit because this is not a mere technical oversight on [August Mack's] behalf; **it is an outright failure to attempt to comply with the clear federal regulations**." [citation to joint appendices omitted]. Dissent at 18-19 (emphasis added).

[24] AME never actually implemented the cleanup of the Site *per se*. It's claim only pertains to removal design work. *See* Newman Affidavit at ¶ 11 (Exhibit A).

After AME appealed the Court's Order to the U.S. District Court for the Northern District of West Virginia, AME continued to assert these same reasons for not seeking preauthorized funding. Again, AME asserted that preauthorization was not warranted in its situation.[25] Specifically, AME admits that, "from October 2012…to May 2016," it did work at the BJS Site as a contractor to Vertellus, which was required to perform cleanup activities under the CD. Amended Complaint ¶¶ 10-11. AME admits that it expected to be paid for that work by Vertellus. *Id.* ¶ 11.[26] AME alleges that, after Vertellus "went broke," AME made claims against Vertellus in bankruptcy for non-payment during this 43-month period. *Id.* ¶ 12, 15; AME also states that it "requested payment from CBS, and Exxon." *Id.* ¶ 16. When those attempts to obtain payment failed, AME then "requested reimbursement from EPA" (*Id.* ¶ 17) by submitting the subject Application Form[27] on January 12, 2017 (Appendix 1, AME Request for Hearing), over four years after the response work was undertaken by Vertellus per the Consent Decree and over four years after the allowable time period under the regulations for seeking preauthorization from the Fund.

As a practical matter, EPA agrees with AME that the preauthorization process "simply does not apply" to it. Given that AME was contractually required to be paid by Vertellus for the work it performed at the BJS Site, even if AME had intended to apply for preauthorization *and*

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[25] Amended Complaint ¶ 25(B) ("EPA wrongly concluded that AME was required to submit an application for preauthorization prior to performing work at the BJS Site."). *See also*, ALJ Order on Motion to Dismiss at 11 (addressing AME's claim that it would have been "futile" for AME to seek preauthorization while Vertellus was still viable).

[26] Indeed, it is a fact that under their contract, Vertellus was required to pay AME for services rendered in accordance with the terms of that contract – and Vertellus was required to make those payments within 30-60 days of receipt of AME's submission of invoices. AME had a right to enforce these payment terms on a 30-60 day clock, but declined to do so, thus allowing Vertellus to default. Why AME did not seek contractual recourse, and why it allowed Vertellus to default for over 4 years is unknown. See AX 16, Proof of Claim, Exh. AA ("SERVICES RELATING TO BIG JOHN'S SALVAGE-HOULT ROAD SUPERFUND SITE, FAIRMOUNT WEST VIRGINIA").

[27] Both the Application Form and the Claim Form contain false material statements and do not provide the requisite data sought. They were clearly filed for litigation purposes and do not comport with EPA's preauthorization process.

had substantially complied with the application process, EPA would nonetheless have been barred from approving the application at that time because, *inter alia*, §307.23(g) precludes EPA from granting pre-authorization where "…the action is to be performed by a…person operating pursuant to a contract with the United States." In other words, Vertellus was under obligation to perform the work pursuant to its Consent Decree with the United States, and because Vertellus was already obligated to do the work, EPA would have been barred from paying Fund money to AME even if it had made such a request prior to undertaking the work.

Even through the lens of substantial compliance, it is undisputed that AME never sought and never even attempted to seek preauthorization. . That undisputed fact alone disposes of AME's claim for payment from the Superfund pursuant to this Court's *sua sponte* authority established in 40 C.F.R. § 305.27, as no genuine issue of material fact(s) "remain controverted in good faith", and AME cannot reinvent the history of events to establish otherwise.

C. **It is appropriate that the Tribunal narrow the issues it needs to decide by applying law of the case, thus foreclosing AME from relitigating settled issues of law and fact**.

The law of the case doctrine forecloses re-litigation of the finding of fact that AME never sought preauthorization, either by filing EPA's preauthorization application form (Form 2075-3) **before** commencing the response action pursuant to 40 C.F.R. § 307.22, *or otherwise* substantially complying with the substance of that requirement by providing EPA the information sought in Form 2075-3, as required by 40 C.F.R. §§ 307.22(b) and (c). "As most commonly defined, the [law of the case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); see *Graves v. Lioli*, 930 F. 3d 307, 318 (4th Cir. 2019); *Williams v. Patrick*, No. 2:2:18-cv-9593, 2020 WL 776886, at *3

n.1 (D. N.J. Dec.30, 2020); *United States v. Batista*, No. 5:09CR00037, 2017 WL 2651717 at *2 n.4 (W.D. Va.Jun 19, 2017); *FMC Corp. v. US EPA*, 557 F.Supp. 2d 105, 109 (D.D.C. 2008). This well-established doctrine promotes the finality and efficiency of the judicial process by "protecting against the agitation of *settled issues*." 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.404[1], p.118 (1984). "Generally speaking, the 'law of the case' doctrine applies to the principle that where there is an *unreversed decision* of a question of ***law or fact*** made during the course of litigation, such decision settles the question for all subsequent stages of the suit." *Wilson v. Ohio River Co.,* 236 F. Supp. 96, 98 (1964) (emphasis added). Moreover, "[t]he doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988).

The fact that AME did not intend or attempt to request preauthorization before beginning the response action in October 2012 has been settled by the findings of fact established by this Tribunal, as affirmed by the U.S. District Court; and these settled issues remain "unreversed" by the Fourth Circuit. *Wilson v. Ohio River Co.,* 236 F. Supp. 96; *Id.* Having never intended to request preauthorization, AME could not have attempted to comply with the preauthorization process, let alone substantially comply with it. Therefore, under either a strict compliance standard or a substantial compliance standard, AME's claim that it "satisf[ied] the intent of the preauthorization process" has no merit because AME utterly failed to attempt to comply with the preauthorization process in the first place.[28]

[28] As to the other elements of preauthorization (i.e. that EPA did not grant preauthorization)– these issues also remain settled, affirmed by the U.S. District Court, and were neither reversed by the Fourth Circuit nor remanded, and remain the law of the case.

1. _The Courts are unified as to the relevant facts, and regardless of whether the strict compliance or substantial compliance standard is applied, the result is the same: AME never sought preauthorization._

This Tribunal has previously adopted AME's aforementioned allegations and admissions, and has settled the subject matter as follows:

> ***The Company states that it never had the intent to submit a claim when it started work at the Site because it expected to be paid by Vertellus…Undoubtedly this is true***. But August Mack reads a limitation into "intending" that does not exist. If a person intends to submit a claim to the Fund, it must first take certain steps to obtain preauthorization. At some point in time, presumably after learning of Vertellus's bankruptcy, August Mack formed an intent to submit a claim to the Fund. At that point, and prior to submitting a claim, August Mack was obligated to obtain preauthorization. ***The unfortunate consequence of August Mack's business relationship with Vertellus is that by the time it formed an intent to obtain preauthorization, it was impossible for August Mack to do so***. But the timing of August Mack's intent to submit a claim does not render the preauthorization requirement inapplicable. If it did, then any person could submit a claim to the Fund after the fact for work it had already performed, *rendering the preauthorization requirement meaningless*. *Given that preauthorization is at the heart of the regulatory procedure for filing a claim, this result is absurd*. In this instance, August Mack may not have intended to submit a claim to the Fund prior to commencing the work, but that does not excuse the company from obtaining preauthorization. **Rather, it highlights the reality that it is too late for the company to submit a claim against the fund for work that was not preauthorized**.

Order at 10-11 (emphasis added). *See also* Order at 8 (finding that "[I]n this case, August Mack admittedly did not seek preauthorization prior to performing work at the Site, and the Agency did not issue a Preauthorization Decision Document…"). In addressing AME's argument that seeking preauthorization while Vertellus was still viable would have been "futile", this Court opines that "when August Mack entered into a subcontracting agreement with Vertellus, it voluntarily placed itself in a position to receive payment from Vertellus ***and did not seek preauthorization for payment from the Fund***. August Mack cannot, after

the fact, raise a futility excuse because its own business calculation did not pan out." Order at 11-12 (emphasis added). Hence, it is well settled by this Court that AME could not possibly have complied with the substantial or essential requirement to seek preauthorization by filing the equivalent of an application, or otherwise. Without a time machine and alternative facts, it is simply impossible that AME could have done so.

The U.S. District Court affirmed Judge Biro's decision in this regard, stating that "it is undisputed that AME did not obtain preauthorization and, thus, did not fulfill the statutory and regulatory requirements. In fact, AME admits that it expected to be paid by Vertellus or the site-specific fund, *rather than by the Superfund*." *August Mack Envtl., Inc.. v. EPA*, No.1:18-CV-12 (Order Granting Motion to Dismiss Amended Complaint) at 8. As to the Fourth Circuit's directive to apply the equitable principle of substantial compliance to the issue on remand, the District Court acknowledges that "AME argues that it *substantially complied* with the requirements and policy of the preauthorization scheme…" *Id*. at 9 (emphasis added). However, after careful and reasoned consideration of AME's substantial compliance argument on preauthorization, the District Court concludes that "*AME failed to seek preauthorization* as required by the governing statute [sic] regulations…[and] AME's substantial compliance argument has no merit because this [failure to seek preauthorization] is not a mere technical oversight on AME's behalf; *it is an outright failure to attempt to comply with clear federal regulations*" *Id*. at 10 (emphasis added).

The Fourth Circuit similarly concludes that: "In this situation, August Mack did not seek or obtain an express preauthorization [PDD] from the EPA before its cleanup of the BJS Site, by using EPA Form 2075-3 *or otherwise*." *August Mack Envtl., Inc. v. EPA*, 841

Fed. App'x 517, 522 (4th Cir. 2021) (emphasis added). Thus, the fact that the Fourth Circuit determined AME did not seek or obtain preauthorization by using the application form *or otherwise*, is an "unreversed decision" of a question of fact made during the course of litigation. *Wilson v. Ohio River Co*; *Id.* Therefore, in applying a substantial compliance standard to this issue in light of that unreversed finding of fact – that AME did not seek preauthorization expressly *or otherwise*, AME's claim must fail because it never attempted to comply with the preauthorization regulations, let alone substantially comply with them.

Finally, although the law of the case doctrine may, *arguendo*, not apply where there are "changed circumstances or unforeseen issues not previously litigated" *(Arizona, Id.* at 619), AME has failed to provide new evidence to prove it was preauthorized under Part 307[29]; and the Courts in this on-going litigation have already decided that AME did not obtain preauthorization, therefore the law of the case doctrine remains germane to further adjudication of this matter. *See e.g. Eagle v. WGAY/WWRC*, No. CCB 94-3202, 1996 WL 1061102, at *4 (D. Md. Sept. 5, 1996) (where defendants tried to argue that plaintiff's charge of discrimination was not timely the court applied the law of the case doctrine because the district court had already decided that the charge was timely and *defendants failed to provide new evidence to show otherwise*) (emphasis added). Here, the Fourth Circuit remand and vacature is narrowed only to the issue of whether AME substantially complied with the preauthorization process.[30] All other aspects of this Court's decision, as affirmed by the U.S. District Court, remain the law of the case per *Arizona v. California* and its progeny. *Graves v. Lioi*, 930 F.3rd 307, 318 (4th Cir. 2019).

D. AME is barred from asserting it substantially complied with preauthorization by principals of judicial and equitable estoppel.

[29] Any new evidence would have to be in the form of a Preauthorization Decision Document ("PDD") – which of course does not exist.

[30] *See e.g.* nt.4, *Infra.*

At the initial stage of litigation before this Court, AME acknowledged that it did not request preauthorized funding of the response action because it expected to be paid by Vertellus. Response at 9; Hearing Request at 20 (affirming that "AME had no reason to seek preauthorization"). This Court responded by stating "[u]ndoubtedly this is true." ALJ Order on Motion to Dismiss at 10. *See also*, EPA AX 16 (AME contract with Vertellus). After gaining the Court's reliance on this settled issue, but having lost its case at the administrative stage, AME subsequently relied on a different argument in its Response in Opposition to the EPA's Motion to Dismiss before the U.S. District Court for the Northern District of West Virginia. In its subsequent Response before Judge Thomas Kleeh of the Northern District of West Virginia, AME shifted tack by arguing that "EPA's current preauthorization process is obsolete and invalid *and may not be used to block AME's access to the Fund*". Response at 5 (emphasis added). AME goes on to say "…and there is currently no clear process AME can discern for meeting EPA's 'preauthorization' requirements…[c]learly, if EPA intended the parties seeking preauthorization to apply using Form 2075-3, it should have revised the Form to identify not only the appropriate office, but at very least the correct address. That the agency could not be bothered to alter the Form demonstrates just how obsolete and irrelevant the EPA's preauthorization process has become." Response at 2-3, 11.

After losing on this issue before this Tribunal, AME hoped for a better result by using the outdated application form as a *post-hoc* rationalization for never seeking preauthorization.[31] That argument, however, is contrary to AME's original position – that AME never attempted to seek preauthorization in the first place because, indeed, Vertellus was contractually obligated to

[31] Note that AME was in fact able to use the form when it attempted to file its time-barred claim in January 2017. Request for Hearing, Appendix 2.

pay AME for the work at issue. *See e.g.*, AME Request for Hearing at 6, ¶1. AME acknowledges that it could not have logically or lawfully sought preauthorization for the recovery of the same costs from the Superfund at that time, as it would have been asking to be paid twice for the same work. Therefore, it is appropriate to bar AME from continuing to argue that it was EPA's obsolete application form which blocked AME from seeking reimbursement from the Fund. Since AME successfully figured out how to file the Application Form when it filed suit against EPA in March of 2017, it certainly could have done so prior to commencing work in 2012. It chose not to do so for the reasons previously stated and acknowledged by AME. AME's inconsistent or contradictory legal argument smacks of obfuscation and sophistry.

Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Zedner v. United States*, 547 U.S. 489, 504 (2006) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Judicial estoppel is an equitable doctrine so there is no precise test for when it applies, but courts often weigh several factors: 1) "a party's later position must be clearly inconsistent with its early position", 2) "whether the party has succeeded in persuading a court to accept that party's earlier position," and 3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (quoting New Hampshire, 532 U.S. at 750-751). Factors 1 and 2 have been met, and factor 3 is also satisfied because if AME prevails in presenting inconsistent or contrary reasons for not seeking preauthorization, it raises an argument that is irrelevant and distracting and misleading in light of the prior admissions that AME did not seek preauthorization. It is noteworthy that the Fourth Circuit has embraced the doctrines of judicial and equitable estoppel. For example, in *Allen v. Zurich Ins. Co*., the Court held that a plaintiff who successfully argued that he was the employee of an insured party and obtained a judgement in his

favor based on that argument could not later argue he was a joint-venturer with the insured party to achieve a new judgement in his favor. *Allen v. Zurich Ins*. Co. 667 F.2d 1162, 1163, 1167 (4th Cir. 1982).

This Tribunal has in effect already rejected AME's alternative position without invoking judicial or equitable estoppel, stating that "[w]ith or without a standardized form, there is clear notice of the information that must be submitted.[32] And, in this case, the fact that the form is 'expired' lends no support to August Mack's argument *because it never sought to use the form* for preauthorization prior to commencing work at the Site." ALJ Order on Motion to Dismiss at 10 (footnote omitted)(emphasis added). Nonetheless, explicit application of judicial or equitable estoppel is still important given that this issue may be revived on appeal yet again, and AME may continue to assert contrary or conflicting positions with respect to why it never intended or attempted to seek preauthorization.

E. **AME did not substantially comply with the preauthorization process because it failed to do "all that can reasonably be expected of [it]."** [33]

Even if, *arguendo*, AME were able to belatedly present evidence that EPA's preauthorization process itself is obsolete, AME is not able to show that it did all that can reasonably be expected of it – or that it took any steps whatsoever – to comply with the preauthorization process. If AME had intended to seek preauthorization, it had ample opportunity to do so. As an agent of Vertellus under the Consent Decree, AME had direct communications with EPA's RPM and could have asked about preauthorization, but AME never did so as it admits that it did not intend to submit a claim to the Fund at the time. Often the

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[32] It is believed that the Court is referring to § 307.22(b) and (c) (setting forth the requisite information that AME must otherwise provide when requesting reimbursement from the Fund prior to commencing work).
[33] See *Sawyer vs. Somona Cnty*. 719 F 2d. 1001, 1008 (9th Cir. 1983)

preauthorization process is initiated in the context of negotiations for cleanup of the site, as required by Part 307. Other entities have been able to initiate the preauthorization process with EPA. In fact, EPA has approved numerous applications in this manner since 1995 and has provided PDDs and mixed funding consent decrees pursuant to CERCLA § 122(b)(1) accordingly. *See* United States Fourth Circuit "Brief for the Appellee" at 21, footnote 3. *See also* AX-3, 8, 10, 11, 15, 17, 18. AME's claim that it could not have applied for preauthorization is false, as it flies in the face of numerous other applicants who have substantially complied with the preauthorization process by successfully contacting the Agency and initiating the preauthorization process. Indeed, the only thing barring AME from seeking preauthorization was AME itself, and its admission that it never intended or attempted to seek preauthorization in the first place. *See also*, Newman Affidavit at ¶¶ 10-17 (affirming that AME did not seek preauthorization, and nor did Mr. Newman purport to grant it) (Exhibit A).

F. AME cannot establish that its work for Vertellus constituted AME's substantial compliance with the preauthorization process.

Having admitted that it neither sought nor received preauthorization pursuant to 40 C.F.R. Part 307, AME would have this Court believe that the EPA oversight and approval process under the Consent Decree substitutes for, or is somehow the equivalent of, preauthorization of AME's claim at bar.[34] According to AME, "the procedures set in place by the Consent Decree provided the structure for the communications between AME and EPA.

[34] AME has also stated that "AME's costs also satisfy the intent of the preauthorization process." It is unclear what AME is referring to with this statement. AME did not submit the subject costs to EPA for review and approval of its claim against the fund. AME admits as much when it says "AME stands ready to provide the cost data to EPA regarding the work that it completed. **But AME was never given the opportunity to do so**…" *August Mack Envtl., Inc.. v. EPA*, No.1:18-CV-12 (N.D. W.Va. filed January 17, 2018; as amended June 1, 2018) *Reply Brief for the Appellant* at 4.

Those communications whereby EPA officials reviewed, commented on, and imposed changes to AME's planned work constitute the approval and preauthorization necessary for payment from the Fund…these communications establish the terms and conditions of the preauthorization…[by] directing, reviewing, approving, and overseeing each and every remedial activity AME undertook at the Site, EPA provided preauthorization."[35] AME's Response in Opposition to Respondent's Motion to Dismiss at 12; *see also* Hearing Request at 23. This Court previously rejected AME's argument and settled the issue as follows:

> …August Mack is incorrect. As the Agency observes, applicable regulations directly refute the notion that mere compliance with the Consent Decree constitutes preauthorization: "Unless otherwise specified and agreed to by EPA, the terms, provisions, or requirements of a . . . Consent Decree . . . requiring a response action do not constitute preauthorization to present a claim to the Fund." 40 C.F.R. § 307.22(j); *see also* Motion at 7. Whatever approval the Agency gave to work that Vertellus provided under the terms of the Consent Decree would have been to ensure Vertellus was upholding its end of the agreement. Preauthorization serves different purposes. *See* 54 Fed. Reg. at 37898. Although it may be true that "*a* procedure existed under the terms of the Consent Decree for EPA to approve and certify all work conducted at the Big John Site," it is not *the* preauthorization procedure for which the regulations provide. *See* Hearing Request at 23 (emphasis added). Thus, August Mack could not meet preauthorization requirements by adhering to whatever preapproval process Vertellus was required to complete under the Consent Decree. Indeed, even if Vertellus itself fully satisfied the review and approval process the Consent Decree mandated, it could not claim to have simultaneously obtained preauthorization under the regulations in Part 307.

[35] This passage exemplifies how AME erroneously conflates itself with Vertellus – as if AME is the performing settling defendant party and it is AME who must conduct the work and receive EPA approval or other communications. This is a false equivalency and a gross misreading of the Consent Decree. *See* Consent Decree at 31 (IX. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS) (clearly identifying Vertellus as the entity to whom approvals or other directives were communicated and clearly identifying Vertellus as the party who must comply). AME's continued substitution of itself for Vertellus is an example of obfuscation and misdirection. *See, generally*, Newman Affidavit (Exhibit A).

Order at 12. The U.S. District Court emphatically agreed with this Tribunal, stating that "nothing under the Consent Decree constitutes preauthorization, and nothing in the Consent Decree creates rights in non-parties. *It is irrelevant that EPA authorized and supervised AME's work.*" District Court Order Granting Motion to Dismiss Amended Complaint [ECF NO. 30] at 10 (emphasis added).[36] This settled issue constitutes the law of the case, and remains "unreversed" by the Fourth Circuit decision. *Wilson v. Ohio River Co.,* 236 F. Supp. 96, 98 (1964). To the extent that there remain any lingering doubts as to the courts' resolution of this issue, the BJS Consent Decree itself explicitly affirms the law of the case as follows: "[n]othing in this Consent Decree shall be deemed to constitute preauthorization of a claim…" CD at 76, ¶77. This provision affirms that the BJS Consent Decree is *expressly* ***not*** *a CERCLA §122(b) "mixed funding agreement*". 42 U.S.C. § 9622(b)[37]. See also 40 C.F.R. §307.14 (stating that "[p]reauthorized response actions are response actions approved through the preauthorization process" set forth in Part 307).

By way of further explanation (which buttresses the courts' aforementioned settlement of this issue), EPA's alleged oversight and approval of Vertellus' work at the BJS Site does not show that AME substantially complied with the preauthorization process. The preauthorization process allows EPA to evaluate, certify, and approve cost claims in a transparent and predictable manner by not just establishing a general plan of work, but also by establishing financial

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[36] To the extent that AME seeks to base its claim against the Fund on EPA's approval process under the Consent Decree, it is not appropriate for the Court to consider such an argument in light of CERCLA Section 122(b)(2), which bars judicial review of fund-financing made available for the purposes of settlement.

[37] CERCLA §122(b) establishes that "the President will reimburse the parties to the agreement from the Fund, with interest, for certain costs of actions under the agreement that the parties have agreed to perform but which the President has agreed to finance." These "mixed funding agreements" or Consent Decrees reference the 40 C.F.R. Part 307 claims procedures, and incorporate the relevant PDDs as appendices thereto. Often times these "mixed funding agreements" take the form of RD/RA Consent Decrees, examples of which are listed in EPA's Prehearing Exchange. *See e.g.* AX-3, 8, 17.

oversight procedures and project costs – information that EPA does not receive from a party – and most importantly here, did not receive from AME - as part of its oversight of a cleanup. *See* nt.27, *Infra*. (AME admission that it never submitted the relevant cost data to EPA). *See also* AX-8, 10, 11, 15, 18 (examples of recent PDDs setting forth procedures for evaluating, certifying, and approving cost claims by establishing financial oversight procedures, auditing and accounting principles, eligible project costs for potential reimbursement, etc.). *See generally*, Newman Affidavit (Exhibit A).

Specifically, when an application for preauthorization is submitted to EPA, it must include, *inter alia*, an explanation of why the proposed response action is necessary and how it adheres to the NCP; a proposed schedule for the work; *projected costs of response activities*; a proposed schedule for submitting eligible claims against the Superfund; proposed project management and oversight procedures; and assurances of timely initiation and completion of work. 40-C.F.R. §307.22(b). If preauthorization is granted, the terms of that approval are set out explicitly in a Preauthorization Decision Document ("PDD") that memorializes the specific "terms and conditions for reimbursement." *Id.* §307.14; *see also* 307.23(e) (PDD conditions include explicit maximum reimbursement amount, financial auditing procedures, and claim substantiation guidelines). *See also* AX-8, 10, 11, 15, 18 (examples of recent PDDs inclusive of these conditions). AME did not initiate a process to request – nor did EPA otherwise issue – a PDD. As previously discussed, these established facts remain the law of the case. *Id*. Order at 12.

In contrast, EPA's oversight of a site specific consent decree, such as the subject BJS Consent Decree, focuses on determining whether a PRP is complying with its legal requirements under the CD to clean-up that site. Among other things, that oversight involves reviewing

submitted work plans and design documents; overseeing construction activities; confirming compliance with health and safety requirements; ensuring that appropriate land use restrictions and environmental covenants are in place; and monitoring remedy performance. *See, generally*, BJS onsent Decree; *See also*, Newman Affidavit at ¶¶ 10-17 (Exhibit A). At the BJS Site, EPA's oversight focused on the implementation of the cleanup by Vertellus – not on the specific cost and accounting procedures used by AME, which would be an integral part of the preauthorization process. As CERCLA Section 111(a)(2) provides, "such *costs* must be approved under said plan and certified by the responsible Federal official." 42 U.S.C. §9611(a)(2) (emphasis added). EPA's oversight and approval of response action work at the BJS Site simply does not equate to the substantive review conducted when a party applies for and receives preauthorization to submit monetary claims for EPA approval and certification and payment from the Fund.[38] Newman Affidavit, *Id.*

1. Notwithstanding the law of the case doctrine, AME lacks standing to assert an eligible claim (or any other cause of action) arising out of any provisions or procedures set forth in the Consent Decree.

AME's claim arises out of a contract it is not privy to; however, to sue the government "on a contract claim, a plaintiff must be in privity of contract with the United States." *Pacific Gas and Electric Company v. United States*, 838 F.3d 1341, 1350 (Fed. Cir. 2016) (quoting *Anderson v. United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003)). "[T]he 'government consents to be sued only by those with whom it has privity of contract." *Id.*

An exception "to the privity requirement… [is] when a 'party standing outside of privity by contractual obligation stands in the shoes of a party within privity,' such as when a party can

[38] See nt. 25, Infra. (relevant cost data admittedly never provided to EPA).

demonstrate that it was an intended third-party beneficiary under the contract." *Id.* at 1350-51. "In order to prove third party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly." *Authentic Apparel Group, LLC v. United States*, 989 F.3d 1008, 1012 (Fed. Cir. 2021) (quoting *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001). "[A]t a minimum there must be a particular, identifiable benefit that was clearly intended to flow to the third party." *Id.* (quoting *PG&E*, 838 F.3d at 1361). Additionally, "indirect benefit [to a plaintiff] is not sufficient to establish third-party beneficiary status." *Id.* *Id* at 1013. A third-party beneficiary relationship can be found where "one party promises another to pay a debt to a third party." *PG&E*, 838 F.3d at 1362. Under the facts of the case at bar, and pursuant to the Consent Decree which is expressly not a mixed funding agreement, AME cannot establish an exception to the privity requirement. There is nothing in the Consent Decree which reflects an intention to benefit AME directly, let alone provide preauthorization to Vertellus. Moreover, the District Court affirmed that AME was not an intended third-party beneficiary, settling the issue by stating that "AME is neither a party to the Consent Decree nor a third-party beneficiary to it." District Court Order Granting Motion to Dismiss Amended Complaint [ECF No. 30] at 11.

In *Authentic Apparel Group*, the court held that plaintiff could not show it was a third-party beneficiary because the benefit of the government's contract flowed directly to the contracting party, not plaintiff. *Authentic Apparel Group*, 989 F.3d at 1012. In *Southern California Federal Sav. & Loan Ass'n. v. U.S.*, the court ultimately held that plaintiff lacked third-party beneficiary status, in part because one of the agreements between the government and the contracting party disclaimed third parties from asserting rights under the agreement. *Southern California Federal Sav. & Loan Ass'n. v. U.S.*, 422 F.3d 1319, 1329 (Fed. Cir. 2005) ("Nothing expressed or referred to in this Agreement is intended or shall be construed to give

any person other than the parties hereto any legal or equitable right, remedy, or claim under, or in respect to, this Agreement or any of its provisions.”).

As in *Southern California*, the subject Consent Decree also disclaims or bars third parties from establishing *any* causes of action or rights under the agreement, stating that *“[n]othing* in this Consent Decree shall be construed to create any rights in, *or grant any cause of action to*, any person not a Party to this Consent Decree.” Decree at 77, ¶ 79 (emphasis added). Thus, AME cannot establish third party beneficiary status.

Consistent with the above stated case law, and in disposing of AME’s claim against the Site-specific funds in the Special Account established under the Consent Decree, The 4th Circuit quoted paragraph 79 of the Decree (“nothing in this Consent Decree shall be construed to create any rights in, or grant a cause of action to, any person not a party to this Consent Decree.”), and affirmed that “[t]he Decree lists the parties bound by it: Vertellus, CBS, and Exxon. Thus, nothing in the Decree provides August Mack with the right to recover from the Special Account.” *August Mack Envtl., Inc. v. EPA*, 841 Fed. App’x 517, 527; nt.5 (4th Cir. 2021). By the same token, nothing in the Consent Decree provides AME with *any* cause of action or right to assert a claim against the Fund for payment of its alleged costs.

G. AME’s Prehearing Exchange does not provide new evidence establishing that it substantially complied with the requirement to submit an application requesting preauthorization.

Contrary to AME’s argument embodied in its Prehearing Exchange “narrative statement”, every document that AME proffers in its Prehearing Exchange evinces that AME was simply fulfilling its duty as a “Supervising Contractor” on behalf of Vertellus, *and not otherwise independently seeking preauthorization on its own behalf*. Likewise, EPA’s communications with Vertellus concerning the subject work reinforce this very fact. See, e.g.

AX-1 at 1 (letter from RPM Newman to Vertellus' John Jones disapproving certain work required of Vertellus, and affirming that the work was "prepared by AME on behalf of Vertellus"). Moreover, AME was fully aware that it was duty bound to submit the subject work to EPA on behalf of Vertellus as required by the contract between Vertellus and AME. AX-16 at 25 (Exhibit AA); AX-16 at 5, ¶ 4 (Schedule 1 to Proof of Claim). It remains undisputed that the unreimbursed costs for the work at issue reflect AME's contractual obligation to Vertellus for which AME was to be paid by Vertellus, not EPA. *Id.* AME admittedly never intended nor attempted to seek post-work reimbursement from the Fund until approximately January 2017 – because during the relevant time period of its claim (October 2012 to May 2016), AME was to be paid by Vertellus for the work AME performed. *Id.* Accordingly, the pre-design and design-related workplans submitted on behalf of Vertellus to EPA under the Consent Decree prior to 2017 cannot equate to substantial compliance with a request for preauthorization. *See also* ALJ Order on Motion to Dismiss at 12 (finding that, pursuant to 40 C.F.R. § 307.22(j), compliance with the CD does not constitute preauthorization and affirming that "[w]hatever approval the Agency gave to work that Vertellus provided under the terms of the Consent Decree would have been to ensure Vertellus was upholding its end of the agreement…"). See *Infra*. at VI.F (distinguishing EPA approval and oversight of Vertellus's work under the Consent Decree from the preauthorization process at issue). *See also* Newman Affidavit at ¶¶ 10-17 (Exhibit A).

VII. EVEN IF, *ARGUENDO*, AME COULD PROVE IT SUBSTANTIALLY COMPLIED WITH THE PREREQUISITE TO SEEK PREAUTHORIZATION, IT'S CLAIM REMAINS MOOT GIVEN THE FACT THAT EPA NEVER GRANTED PREAUTHORIZATION.

Even if this Court should find that AME substantially complied with EPA's preauthorization process pursuant to Part 307, AME's claim is nonetheless ineligible for reimbursement from the Superfund for two specific reasons. First, EPA never issued a PDD with

respect to AME and the BJS Site. This fact is not in dispute. Second, any alleged response costs were not "certified by the responsible Federal official," as is required by CERCLA § 111(a)(2).

It remains undisputed that EPA did not issue a PDD with respect to AME and the BJS Site. [39] A PDD is an essential component of the preauthorization process because it embodies EPA's decision to grant preauthorization, and it "sets forth the terms and conditions for reimbursement," thus allowing EPA to properly administer claims against the Fund. Finally, the Agency's regulatory scheme plainly states that "[a]wards will be made: …[o]nly to the extent that the response actions were preauthorized by EPA pursuant to § 307.23; …*and [o]nly to the extent that the cleanup was performed in compliance with the terms and conditions of the PDD*." 40 C.F.R. § 307.32(f)(2) and (4)(emphasis added). This Tribunal, as affirmed by both the US District Court and the Fourth Circuit, have unanimously ruled that the Agency did not issue AME the requisite PDD granting preauthorization and setting forth the terms and conditions for reimbursement. *See* ft.37, *Infra*. Moreover, EPA would be acting *ultra vires* were it to process a claim against the Fund without a PDD. For this reason alone, AME's claim should fail and be dismissed with prejudice. Any other result would effectively upend the CERCLA claims procedures, rendering them essentially meaningless.

Second, even assuming that AME submitted information to EPA that this Court could conclude "substantially complies" with EPA's preauthorization process, no "responsible Federal official" has approved and certified costs as required by CERCLA § 111(a)(2). Remedial Project

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[39] *See* ALJ Order on Motion to Dismiss at 8 ("…the Agency did not issue a Preauthorization Decision Document setting forth the terms and conditions under which it would reimburse August Mack"); US District Court Order Granting Motion to Dismiss Amended Complaint at 8 (holding that "[I]t is undisputed that AME did not obtain preauthorization and, thus did not fulfill the statutory and regulatory requirements"); Fourth Circuit Opinion at 522 (ruling that "[i]n this situation, August Mack did not seek or obtain an express preauthorization from the EPA before its cleanup of the BJS Site, by using EPA Form 2075-3 or otherwise").

Manager Eric Newman ("Mr. Newman" or "RPM Newman") testified under oath that he did not believe he was preauthorizing AME's response costs for a future claim against the Fund. Moreover, Mr. Newman testified that he had no authority to review or approve requests for preauthorized mixed funding. In his affidavit, Mr. Newman stated:

> At no point during the period that AME was working under contract for Vertellus did AME submit to me any costs claimed against the Superfund, including the alleged unreimbursed costs that now form the basis for AME's $2.66 million dollar claim against the Superfund. Nor have I ever subsequently approved or certified such alleged claims made against the Superfund. The scope of my oversight of Vertellus' compliance with the BJS CD pertained to review and approval of work plans and deliverables submitted by AME on behalf of Vertellus. In doing so, I evaluated whether the submittals were consistent with the Work defined in the CD and the response action selected in the Action Memorandum. None of those required submittals contained any claimed costs against the Superfund, which would have been irrelevant to my review.
>
> I do not have authority to provide EPA's prior approval to submit a claim against the Superfund; nor did I represent to Vertellus or AME that I could or was attempting to provide EPA's prior approval or preauthorization to submit a claim against the Superfund. I have never been designated as a responsible Federal official as that term is used in Section 111(a)(2) of CERCLA, or otherwise been delegated preauthorization authorities.

Newman Affidavit at ¶¶ 14-15 (Exhibit A). *See also* Newman Deposition at 22, ll.9, 15; and 28-29, ll.21-25; ll 1-11 (Exhibit B)(excerpted).

As a matter of law, Mr. Newman is correct that he is not the "responsible Federal official" delegated with the authorities to preauthorize claims and approve or certify reimbursement for claimed response costs. Preauthorization authorities are delegated exclusively to the Regional Administrators and these authorities "may be redelegated to the division Director Level or equivalent, *and no further*." See EPA's CERCLA Delegations of Authority, 14-9. Claims

Asserted Against the Fund for Response Costs (attached hereto as Exhibit C).[40] As such, RPM Newman lacks the legal authority to grant or deny preauthorization, and could not have done so even if, *arguendo*, he had intended to do so.

Hence, it is not relevant whether AME is found to have substantially complied with its obligation to request preauthorization in the first place. Therefore, AME's claim is moot, with the substantial compliance inquiry before this Court merely an academic exercise. *See Sigma Chi Fraternity v. Regents of University of Colo*., 258 F. Supp. 515, 523 (D. Colo. 1966)(holding that when an action "no longer presents a justiciable controversy because the issue involved has become academic or dead," or "a judgement, if rendered, will have no practical legal effect upon the existing controversy," it is moot). Even a favorable decision on substantial compliance will not entitle AME to payment of its claim. *See also Murphy v. Hunt,* 455 U.S. 478, 481-82 (1982) (holding that plaintiff's claim for pre-trail bail became moot after he was convicted because "even a favorable decision on [his bail claim] would not have entitled [plaintiff] to bail").

[40] EPA's CERCLA delegations of authority are public documents and can be found on EPA's website: nepis.epa.gov. See also EPA's National Service Center for Environmental Publications (NSCEP).

VIII. CONCLUSION

For the preceding reasons, the Agency has demonstrated by the preponderance of the evidence that no genuine issue of material fact exists as to the issues before this Court, and that EPA is entitled to judgment as a matter of law on the basis that AME's request for payment from the Superfund cannot be granted for the reasons and settled facts evinced herein. *See In the Matter of Harpoon P'ship,* Docket No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 52, at *19-20 (ALJ, August 4, 2003).

Respectfully submitted on behalf of EPA's Claims Official,

______________ ______________________________

Date

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CERTIFICATE OF SERVICE

I certify that the foregoing Agency's Renewed Motion for Accelerated Decision and Memorandum of Law in Support thereof in the *Matter of August Mack Environmental, Inc.*, Docket No. CERCLA-HQ-2017-0001, was filed and served on the Chief Administrative Law Judge Susan L. Biro this day through the Office of Administrative Law Judge's E-Filing System.

I also certify that an electronic copy of the aforementioned Renewed Motion for Accelerated Decision and Memorandum of Law in Support thereof was sent this day by e-mail to the following e-mail addresses for service on Requestor's counsel: Bradley Sugarman @ bsugarman@boselaw.com; Philip Zimmerly @ pzimmerly@boselaw.com; and Jackson Schroeder @ jschroeder@boselaw.com.

____________ ______________________________

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EXHIBIT "A"

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
August Mack Environmental Inc.,	)	Docket No. CERCLA-HQ-2017-0001
	)	
Requestor	)	

AFFIDAVIT OF ERIC NEWMAN
IN SUPPORT OF EPA's AMENDED MOTION FOR ACCELERATED DECISION

I, Eric Newman, declare as follows under penalty of perjury:

1. I am employed as a Remedial Project Manager in the Hazardous Site Cleanup Division of the United States Environmental Protection Agency ("EPA"), Region 3. I have held that position since April 1988. The role of a Remedial Project Manager is established in the National Contingency Plan ("NCP") at 40 C.F.R. § 300.120.

2. My duties as Remedial Project Manager ("RPM") include, among other things, responding to releases and threats of releases of hazardous substances under the National Contingency Plan and overseeing removal actions and remedial actions conducted under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). As an RPM, I coordinate, direct, and review the work of other agencies, responsible parties, and contractors to assure compliance with the NCP, agency decision documents such as Action Memoranda, consent decrees and EPA-approved plans applicable to the response.

EXHIBIT "A"

3. Since March 13, 2006, my duties as a Remedial Project Manager have included overseeing response activities at the Big John's Salvage-Hoult Road Superfund Site ("BJS Site" or "Site"), located along the east bank of the Monongahela River in Fairmont, Marion County, West Virginia. A Removal Administrative Record has been previously compiled for the BJS Site, and was most recently updated July 17, 2013, to document historic plant operations, response actions, EPA decision documents and related enforcement documents, including a Consent Decree (Civil Action No. 1:08-CV-124) entered on October 10, 2012 in U.S. District Court for the Northern District of West Virginia ("BJS CD", "CD" or "Consent Decree"). The Administrative Record is available to the public on the EPA website (www.epa.gov/arweb).

4. Reilly Tar and Chemical Corporation ("Reilly"), a predecessor to Vertellus Specialties, Inc. ("Vertellus"), owned the Site from 1932 until 1973. Reilly received crude coal tar from the adjacent Sharon Steel-Fairmont Coke Works facility. The coal tar was processed and refined into various products which included creosote, phenol, road tar and naphthalene on the BJS Site.

5. Coal tar is a dark, oily, viscous material, consisting mainly of hydrocarbons. It is a by- product from manufacturing coal gas and/or making coke for the steel industry. The crude tar contains a large number of organic compounds, such as benzene, naphthalene, and phenols which can be obtained by distillation. Crude tar also contains various larger polycyclic aromatic hydrocarbons ("PAHs"), such as benzo(a)pyrene which are less volatile. Many PAHs, including naphthalene and benzo(a)pyrene (both contaminants of concern at the BJS Site) are "hazardous substances" within the meaning of Section 101(14) of CERCLA, 42 U.S.C § 9601(14), because they are listed at 40 C.F.R. § 302.4.

6. During the period of operation by Reilly, historical records document that coal tar wastes and by-products from the Big John's Salvage Site were spilled on the ground surface and discharged to a tributary flowing to the Monongahela River.

7. On September 30, 2010, EPA issued an Action Memorandum documenting that soil and groundwater at the BJS Site and sediments in the Monongahela River adjacent the Site are contaminated with PAHs at levels that present or may present an imminent and substantial endangerment to the public health or welfare or to the environment. The Non-Time Critical Removal Action ("Removal Response Action") to be implemented at the Site is also embodied in the Action Memorandum.

8. Major components of the Removal Response Action include the following "Work" as that term is defined in the BJS CD: a) constructing a RCRA subtitle D-type cap over an area of the Site referred to as the "Upland Area"; b) upgrading an existing groundwater containment and treatment system in the Upland Area; and c) excavating a mass of tar waste deposits and associated contaminated sediments from the Monongahela River for disposal at an appropriately permitted facility.

9. Vertellus' obligation to implement the Removal Response Action is memorialized in the BJS CD as follows: Vertellus "shall perform the Work in accordance with this Consent Decree, the Action Memorandum, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by [Vertellus] and approved by EPA pursuant to this Consent Decree." The BJS CD requires that Vertellus provide a copy of the Decree to each contractor hired to perform Work required by the Decree and condition all contracts entered into for performance of the Work in conformity with the terms of the Decree. The BJS CD states that

Vertellus remains responsible for ensuring that its contractors perform the Work required by the Consent Decree.

10. In 2012, Vertellus notified me that it had retained August Mack Environmental, Inc. ("AME") as its "Supervising Contractor" to perform the Work required by the BJS CD. On November 6, 2012, EPA accepted Vertellus' selection of AME as its Supervising Contractor in advance of Vertellus performing any work pursuant to the CD. In that role, AME coordinated or conducted certain design-related Work on behalf of Vertellus pursuant to the terms of the CD. I reviewed and commented on that Work in accordance with the approval process set forth in Section IX (EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS) of the Consent Decree. At all times relevant to AME's claim, I coordinated with Vertellus, and its supervising contractor AME, as appropriate to ensure that Vertellus' was proceeding with the Work consistent with the CD.

11. Work performed by AME in its capacity as Supervising Contractor on behalf of Vertellus was limited to partial performance of Removal Design Work Plans, such as Pre-Design Investigation Activities, and initial or conceptual design reports. At the point that Vertellus filed for bankruptcy and stopped performing Work required by the CD, it had not yet completed any substantive clean-up work beyond basic conceptual planning and environmental sampling, and no final design documents were submitted to me by or on behalf of Vertellus.

12. I coordinated technical review of Work Plans and other deliverables submitted to me by Vertellus, or by AME on behalf of Vertellus. Such technical review usually involved input from WVDEP and other stakeholders. As RPM, and consistent with Section XII of the BJS CD, I

approved or disapproved (with conditions or modifications, as needed) various Work plans and deliverables, which Vertellus was required to submit pursuant to the CD.

13. EPA was not party to the contract between Vertellus and AME. As such, EPA had no obligation to pay or otherwise reimburse AME for work performed pursuant to that contract.

14. At no point during the period that AME was working under contract for Vertellus did AME submit to me *any* costs claimed against the Superfund, including the alleged unreimbursed costs that now form the basis for AME's $2.66 million dollar claim against the Superfund. Nor have I ever subsequently approved or certified such alleged claims made against the Superfund. The scope of my oversight of Vertellus' compliance with the BJS CD pertained to review and approval of work plans and deliverables submitted by AME on behalf of Vertellus. In doing so, I evaluated whether the submittals were consistent with the Work defined in the CD and the response action selected in the Action Memorandum. None of those required submittals contained any claimed costs against the Superfund, which would have been irrelevant to my review.

15. I do not have authority to provide EPA's prior approval to submit a claim against the Superfund; nor did I represent to Vertellus or AME that I could or was attempting to provide EPA's prior approval or preauthorization to submit a claim against the Superfund. I have never been designated as a responsible Federal official as that term is used in Section 111(a)(2) of CERCLA, or otherwise been delegated preauthorization authorities.

EXHIBIT "A"

16. All Work performed at the BJS Site by AME on behalf of Vertellus was done under AME's express representation to EPA that all such Work was being performed as Vertellus' Supervising Contractor pursuant to the Consent Decree.

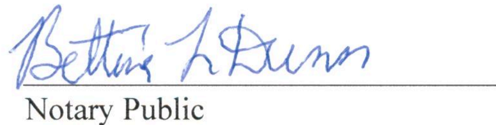
17. In summary, as EPA's RPM and Project Coordinator overseeing the cleanup being conducted at the BJS Site under the BJS CD, I reviewed and approved certain aspects of the Work conducted by AME as Vertellus' Supervising Contractor. My oversight of the Work was limited to ensuring compliance with the CD. I have never had authority to preauthorize claims against the Superfund, and nor did I purport to grant any such preauthorization with regard to the Work that Vertellus was required to perform at the BJS Site or that AME performed on Vertellus' behalf.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Eric Newman

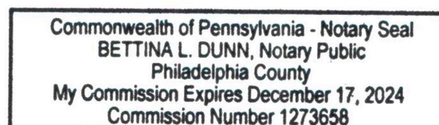
8/24/22
Date

SUBSCRIBED AND SWORN TO BEFORE ME THIS 24 DAY OF August, 2022.



Notary Public

12-17-2024
Commission Expiration Date



8 this case would be the action memo. So it's, yeah,
9 the consent decree and its documents. That's
10 what --
11 Q Sure.
12 A I was trying to make sure I didn't miss that
13 because that's the technical part.
14 Q Right. And so when -- right.
15 There's a lot of information in the consent
16 decree itself, but the technical part of it is in
17 the action memo attached to and made a part of the
18 consent decree; right?
19 A Yes.
20 MS. BERG: Objection to form.
21 MR. MCNEIL:
22 Q The final general category that's been identified
23 for you as a potential witness is any and all
24 action you undertook to assure compliance with the
25 consent decree, including correspondence and

1 interactions with Vertellus and/or its contractors.
2 Just as a general matter, anything else that
3 you could -- that you would describe fitting within
4 that category that you haven't already touched on?
5 A That covers it.

6 Q Okay. Do you know what the preauthorization
7 process is at EPA?
8 A I'm generally familiar with it.
9 Q Do you have any role in reviewing preauthorization
10 requests?
11 A So that's very rare that we would have something
12 like that. But I would not have a major role in
13 that.
14 Q So what --
15 A Like, I have no authority related to that.
16 Q Sure.
17 A Just the technical, like, information that might be
18 related to that project and then I would have some
19 input on that, but that's it.
20 Q So when you say -- you used the word rare.
21 What's rare?
22 A I've only heard of a handful of cases ever
23 happening at Region 3 over my 30 years.
24 Q So you've heard of a handful of cases. Did -- in
25 your 30 years.

1 Did you have any particular task assigned to
2 you as part of the preauthorization process in
3 those instances?

21 A So I don't get claims made on my sites. You know,
22 I have invoices that are submitted in accordance
23 with the contract if it's an EPA contractor.
24 That's the only way that I would be looking at
25 costs, like a monthly invoice-type of thing.

1 Q So when you get an invoice on an EPA site, what do
2 you do with it?
3 A Yeah, I confirm that it was -- that the work was
4 performed in accordance with the scope of work of
5 the contract that they were working under, and then
6 I recommend to the CO, based on what I see, if the
7 costs were incurred within the technical scope and
8 using professional levels that have been pre-agreed
9 to under the contract.
10 Q Are you looking at whether or not the costs
11 incurred were necessary and reasonable?
12 MS. BERG: Objection, form.
13 MR. COHAN: Objection.
14 A In that case -- in the case where I would be
15 reviewing an invoice, I'm comparing it to the scope
16 of work that the -- that was entered into by the
17 contracting officer, and I'm their representative.
18 I'm the contracting officer's representative --

19 technical representative. So that's kind of my
20 role.
21 Q August Mack submitted a claim to EPA for payment in
22 roughly January of 2017.
23 Did you play any role in reviewing that claim?
24 A That -- it was out of the blue. I didn't know what
25 it was. You know, I just passed it up. It was

1 outside my normal, you know, RPM world. So that
2 was --
3 Q Did you receive a copy of the claim from somebody,
4 whether inside EPA or from August Mack?
5 A Well, the document -- the big document came in to
6 me directly, and I didn't -- you know, every time I
7 get a submittal, I always know why I'm getting the
8 submittal, and I know what to do with it. This was
9 outside my world, outside my RPM responsibilities,
10 so I handed it off to the attorney and my
11 supervisor without much else. I didn't know what I
12 would be doing with it, you know. I pretty much
13 have a full schedule every day, so I don't just
14 dive into things that come into my desk.
15 Q Then after you passed it off to the attorney and
16 your supervisor, did you have any follow-up role in

17   reviewing any part of the submitted claim?
18 A   I was part of a group, like, talking about, you
19   know, "What is this?" and trying to put it into
20   context. But it was --
21 Q   Go ahead.
22 A   Yeah, just, you know, as the group, trying to
23   figure out, "What is this?" Because it didn't fit
24   in any box.
25 Q   Who was -- who did this group include?

1   A   It would include my assigned attorney. The legal
2   was number one. I think the attorney also received
3   it concurrently. And then my management.
4   Q   Who was included in your management?
5   A   It would probably be the whole chain, you know.
6   We've had a little reorganization. I think it was
7   our branch chief, who now is referred to as section
8   chief. But it was branch chief, associate division
9   director, director -- everybody was aware that this
10   had come in. It was -- you know, we were alerted,
11   but we didn't know how to handle it. It wasn't
12   expected as a group. That's all I could say. We
13   were just -- didn't know what to do.
14 Q   Do you know who Silvina Fonseca is?

14-9. Claims Asserted Against the Fund for Response Costs

1200 TN 547
07/24/2002
Administrative Update 10/16/2016

1. **AUTHORITY.**

   Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Sections 111, 112 and 122; 40 CFR Part 300, "National Oil and Hazardous Substances Pollution Contingency Plan" (NCP); 40 CFR Part 307, "CERCLA Claims Procedures"; and 40 CFR Part 305, "CERCLA Administrative Hearing Procedures for Claims Against the Superfund":

   a. To preauthorize claims against the Hazardous Substance Superfund for necessary response costs;
   b. To approve reimbursement for claimed response costs; and
   c. To serve as the Review Officer.
2. **TO WHOM DELEGATED.**
   a. Regional Administrators are delegated the authorities in 1.a and 1.b above.
   b. The Assistant Administrator for Land and Emergency Management (AA/OLEM) is delegated the authority in 1.c.
3. **LIMITATIONS.**
   a. Regional Administrators must obtain approval from both the AA/OLEM and the Assistant Administrator for Enforcement and Compliance Assurance (AA/OECA) or his/her designee before exercising the authorities in 1.a (for the original preauthorization and any modifications thereto). The AA/OLEM and the AA/OECA or his/her designee may waive this limitation by memorandum.
   b. Regional Administrators must obtain approval from the AA/OLEM before exercising the authorities in 1.b. The AA/OLEM may waive this limitation by memorandum.
   c. The Review Officer may not be the same official who approved 1.a and 1.b authorities.
   d. These authorities shall be exercised subject to approved funding levels.

4. **REDELEGATION AUTHORITY.**

   a. These authorities may be redelegated to the division Director level or equivalent, and no further.
   b. An official who redelegates an authority retains the right to exercise or withdraw the authority. Redelegated authority may be exercised by any official in the chain of command to the official to whom it has been specifically redelegated.

5. **ADDITIONAL REFERENCES.**
   a. EPA Delegation 14-13-B, Concurrence in Settlement of Civil Judicial Actions
   b. EPA Delegation 14-14-C, Administrative Actions Through Consent Orders